

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of:

Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
Petition of ALLTEL Communications, Inc.)	DA 04-565
For Consent to Redefine the Service)	
Areas of Rural Telephone Companies)	
In the State of Wisconsin)	

To: Chief, Wireline Competition Bureau

REPLY COMMENTS OF MIDWEST WIRELESS WISCONSIN L.L.C.

Midwest Wireless Wisconsin L.L.C. ("Midwest"), by counsel and pursuant to the Commission's *Public Notice* dated April 12, 2004,¹ hereby provides its reply comments in support of the petition of ALLTEL Communications, Inc. ("ALLTEL") seeking FCC concurrence with the redefinition of the service areas of several Wisconsin incumbent local exchange carriers ("ILECs") as provided under Section 54.207 of the FCC's rules, 47 C.F.R. Section 54.207. These reply comments respond to comments filed by TDS Telecommunications Corp. ("TDS").

¹ *Parties Are Invited To Update The Record Pertaining To Pending Petitions For Eligible Telecommunications Carrier Designations*, Public Notice, DA-04-999 (rel. April 12, 2004). The deadline for filing reply comments, initially set for Friday, June 4, 2004, was extended until Wednesday, June 9, 2004. See Public Notice, "Due Date Extended for Reply Comments Concerning Supplemented Petitions for Eligible Telecommunications Carrier Designations," DA 04-1628 (rel. June 3, 2004). These reply comments are filed with the Chief, Wireline Competition Bureau, who has delegated authority pursuant to 47 C.F.R. Section 54.207(e). See also *The Wireline Competition Bureau Seeks Comment on Alltel's Petition to Redefine Rural Telephone Company Service Areas in the State of Wisconsin*, Public Notice, DA 03-3876 (rel. Dec. 4, 2003).

I. TDS’ “CREAM-SKIMMING” ANALYSIS REGARDING ALLTEL IS NOT RELEVANT TO THIS PROCEEDING

TDS improperly requests denial of the Petition with respect to the TDS companies based on its view that “under the standards set forth in *Virginia Cellular* and *Highland Cellular*, redefining the TDS RLECs’ service area as proposed will allow ALLTEL to ‘cream-skim’ and could undermine the TDS RLECs’ ability to serve their study areas.”² Contrary to TDS’ claim, neither *Virginia Cellular* nor *Highland Cellular* established standards for evaluating petitions for concurrence with state commissions’ proposals to redefine rural ILEC service areas. Rather, they only set standards for the FCC to follow in designating competitive ETCs. Service area redefinition is *not* an opportunity to revisit state ETC designations, which are performed under the state commission’s exclusive authority pursuant to 47 U.S.C. Section 214(e)(2). By pointing to decisions made pursuant to Section 214(e)(6), TDS impermissibly suggests the FCC may insert itself belatedly into an already-completed public interest analysis well outside of its statutory authority.

TDS’ most serious error, however, is its attempt to persuade the Commission to turn what was designed to be a streamlined, competitively neutral process into a tedious, company-specific numbers game with no rational object. A comparison of wire-center costs – or proxies for costs, whether in the form of “population density” or “line density” – relating to an individual competitor has no place in a service area redefinition proceeding that could potentially affect an infinite number of current and future competitors. As Midwest explained in its initial comments, a grant of ALLTEL’s petition would not only cause ALLTEL’s conditional ETC designation to take effect in the rural ILEC areas it partially serves, it would also enable Midwest, Nextel, and

² TDS Comments at p. 2.

several other competitive ETCs with conditional designations in those areas to have their designations take effect without further action.³ With the redefined service areas in place, additional competitors could be designated in the future for portions of the same rural ILEC service areas, all without the FCC's participation. None of this has anything to do with whether ALLTEL is primarily serving high- or low-density wire centers, yet all of it directly depends on the FCC's decision in this case.

It would be both impractical and fruitless to borrow the "population density" analysis from *Highland Cellular* for use in a service area redefinition proceeding. Suppose, for example, that Carrier A serves the four lowest-density wire centers in a rural ILEC study area consisting of 10 wire centers. The state commission conditionally designates Carrier A as an ETC and requests FCC agreement with its proposal to redefine the rural ILEC's service area along wire-center boundaries to allow Carrier A's designation to take effect. The FCC conducts a *Highland Cellular* "density" analysis and determines that, since Carrier A is proposing to serve only the lowest-density wire centers, and therefore is unlikely to cream-skim, the rural ILEC's service area should be redefined as proposed. Subsequently, Carrier B, a competitor serving only the three *highest*-density wire centers of the same rural ILEC, applies to the state commission for ETC status. Because the rural ILEC's service area has already been redefined, Carrier B's ETC designation, if granted, would become effective immediately without the need for FCC concurrence. The FCC, having enabled the redefinition based on Carrier A's "density" data, will obviously have no opportunity to pass on the question of whether Carrier B would have an opportunity to cream-skim. Of course, a state commission presented with such facts would be

³ Midwest Comments at pp. 6-7.

unlikely to designate Carrier B as an ETC. But that is exactly the point: relative “density” with respect to an individual competitor is a *designation* issue, not a *redefinition* issue.

While TDS does its best to blur the lines, redefinition must not be confused with designation. While designation involves a public interest determination – including whether the carrier in question is likely to cream-skim – redefinition lays the groundwork for states to designate competitive ETCs pursuant to their independent statutory authority, without unreasonable barriers to entry impeding the process. Because service area redefinition removes entry barriers for all current and future competitors in a given rural ILEC’s service area, an analysis of “population density” or “line density” with respect to a particular competitor is simply not warranted under the framework provided by the Federal-State Joint Board on Universal Service (“Joint Board”). In its 1996 *Recommended Decision*, the Joint Board did not recommend an analysis of whether an individual carrier would cream-skim, but the much broader question of whether cream-skimming “by potential competitors” has been minimized.⁴ This question was resolved once and for all in 2001, when the FCC concluded in its *Fourteenth Report and Order* that “as a general matter, support should be disaggregated and targeted below the study area level” and provided rural ILECs with a streamlined, administratively simple means of doing so.⁵ Because “rural telephone companies now have the option of disaggregating and targeting high-cost support below the study area level so that support will be distributed in a manner that ensures that the per-line level of support is more closely associated with the cost of

⁴ *Federal-State Joint Board on Universal Service, Recommended Decision*, 12 FCC Rcd 87, 179-80 (Jt. Bd. 1996) (“1996 Recommended Decision”).

⁵ *Federal-State Joint Board on Universal Service, Fourteenth Report and Order, Twenty-second Order on Reconsideration, and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 11244, 11302 (2001) (“*Fourteenth Report and Order*”).

providing service[. . . any concern regarding ‘cream-skimming’ . . . has been substantially eliminated.”⁶

With the disaggregation rules firmly in place, neither *Virginia Cellular* nor *Highland Cellular* changes the very straightforward analysis that applies to petitions for service area redefinition. Recognizing this fact, several state commissions have recently confirmed that the opportunity to disaggregate support fully resolves whatever cream skimming concerns may have at one time existed, and, accordingly, declined to conduct a “population density” analysis when designating a competitor for an area smaller than a rural ILEC’s entire study area.⁷ If there is a possibility that a particular competitive ETC will cream-skim, then it is the responsibility of the designating agency to deny ETC status or grant it subject to appropriate conditions to address such concerns – as the FCC did in *Virginia Cellular* and the Verizon South wire centers in *Highland Cellular*. If the state designates the competitor upon a determination that it will not cream-skim, the FCC must respect that decision made validly under Section 214(e)(2).

II. THERE IS NO BASIS FOR TDS’ REQUEST TO DELAY CONSIDERATION PENDING THE COMMISSION’S CONSIDERATION OF RULE CHANGES

TDS seeks protection from competitive entry, or alternatively, a delay in having a competitor receive high-cost support so it can enter. The FCC has rules in place and it is required

⁶ *Western Wireless Corp.*, 16 FCC Rcd 18133, 18141 (2001) (“*Pine Ridge*”).

⁷ *See, e.g.*, AT&T Wireless PCS of Cleveland, LLC, Docket No. UT-043011 at p. 9 (Wash. Util. & Transp. Comm’n, 2004) (“AT&T Washington Order”); Northwest Dakota Cellular of North Dakota Limited Partnership d/b/a Verizon Wireless et al., Case No. PU-1226-03-597 et al. at pp. 10-12 (N.D. PSC, Feb. 25, 2004) (“Verizon Wireless N. Dakota Order”); Easterbrooke Cellular Corp., Recommended Decision, Case No. 03-0935-T-PC at p. 55 (W.V. PSC, May 14, 2004) (“Easterbrooke Cellular”); Petition by the Public Utilities Commission of the State of Colorado to Redefine the Service Area of CenturyTel of Eagle, Inc., Pursuant to 47 C.F.R. § 54.207(c), Supplement to Petition by the Colorado Public Utilities Commission at p. 6 (filed May 14, 2004); Petition by the Minnesota Public Utilities Commission for Agreement with Changes in Definition of Service Areas for Exchanges Served by CenturyTel et al., Supplemental Comments of the Minnesota Public Utilities Commission at p. 3 (filed May 14, 2004).

to decide cases under those rules until they are changed.⁸ It has now been over eight months since Midwest was designated in Wisconsin. It is long overdue for the Commission to act and delay is simply not fair to the competitive ETCs in Wisconsin or to the rural consumers who are waiting for high-cost support to commence.

III. CONCLUSION

In deciding whether to redefine a rural ILEC's service area, the FCC and state commissions must "tak[e] into account recommendations of [the] Joint Board[.]"⁹ Perhaps the most important recommendation issued by the Joint Board was the following:

We recommend that the Commission encourage states, where appropriate to foster competition, to designate service areas that do not disadvantage new entrants. Consequently, we recommend that the geographic size of the state designated service areas should not be unreasonably large. An unreasonably large area may deter entry because fewer competitors may be able to cover start-up costs that increase as the size of the area they must serve increases . . . Additionally, if states simply structure service areas to fit the contours of an incumbent's facilities, a new entrant, especially a CMRS-based provider, might find it difficult to conform its signal or service area to the precise contours of the incumbent's area.¹⁰

Ironically, state commissions, not the FCC, are now taking the lead in redefining rural ILEC service areas so as to foster competition.¹¹ Midwest believes that rural consumers in Wisconsin

⁸ *Boston Edison Co. v. Federal Power Comm'n*, 557 F.2d 845, 849 (D.C. Cir. 1977) (agency action was arbitrary and capricious where agency required applicants to submit evidence in accordance with filing requirements that had been proposed but not yet adopted); *Amendment of Part 74, Subpart K, of the Commission's Rules*, 22 FCC 2d 586, 591 (1969) (FCC "is bound to follow its existing rules until they have been amended pursuant to the procedures specified by [the Administrative Procedure Act].").

⁹ 47 U.S.C. Section 214(e)(5).

¹⁰ *1996 Recommended Decision*, *supra*, 12 FCC Rcd at 181.

¹¹ See, e.g., Petition by the Public Utilities Commission of the State of Colorado to Redefine the Service Area of CenturyTel of Eagle, Inc., Pursuant to 47 C.F.R. § 54.207(c) at 5 (filed with the FCC Aug. 1, 2002, effective date Nov. 24, 2002) ("CPUC Petition") ("[N]o company could receive designation as a competitive ETC unless it is able to provide service in 53 separate, non-contiguous wire centers located across the entirety of Colorado . . . [T]his constitutes a significant barrier to entry."); Verizon Wireless N. Dakota Order, *supra*, at p. 12 ("A . . . law that would

would be well-served by an FCC decision that follows the states' lead and recognizes that its disaggregation framework provides all necessary protection from uneconomic market entry.

The WPSC has properly exercised its statutory authority in determining that the public interest would be served by designating Midwest and other carriers throughout their licensed service areas in Wisconsin. ALLTEL and other recently designated ETCs are awaiting FCC concurrence so that the WPSC's intent may be fulfilled. Midwest respectfully requests the FCC to promptly issue an order concurring with the redefinition approved by the WPSC and requested by ALLTEL so that rural consumers can start to benefit from high-cost support in those areas at the earliest possible date.

Respectfully submitted,

MIDWEST WIRELESS WISCONSIN L.L.C.

By:


David LaFuria
Steven M. Chernoff
Its Attorneys

Lukas Nace Gutierrez & Sachs, Chartered
1111 19th Street, N.W.
Suite 1200
Washington, DC 20036
(202) 857-3500

June 9, 2004

be construed to deny designation of federal ETC status based on a study area requirement could essentially prohibit [a competitor's] ability to provide the supported services. . . The [North Dakota] Commission's action to redefine the service area requirement as requested by [Verizon Wireless] is necessary to facilitate the granting of the federal ETC to [Verizon Wireless] in the areas of the rural telephone companies' service areas that fall within Verizon Wireless' CMRS licensed areas.")

CERTIFICATE OF SERVICE

I, Kimberly Verven, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, hereby certify that I have, on this 9th day of June, 2004, placed in the United States mail, first-class postage pre-paid, a copy of the foregoing *Reply Comments of Midwest Wireless Wisconsin L.L.C.* filed today to the following:

Stuart Polikoff
Director of Government Relations
OPASTCO
21 Dupont Circle NW
Suite 700
Washington, DC 20036

John F. Jones
Vice President, Federal Government
Relations
CenturyTel, Inc.
100 Century Park Drive
Monroe, LA 71203

Ray J. Riordan
Riordan Law Office
Suite 202
7633 Ganster Way, Suite 202
Madison, WI 53719
Counsel for Local Exchange Carrier
Division of the Wisconsin State
Telecommunications Association

Karen Brinkmann
Tonya Rutherford
Latham & Watkins
Suite 1000
555 Eleventh Street, N.W.
Washington, DC 20004-1304
Counsel for CenturyTel, Inc.

Glenn S. Rabin
Vice President, Federal Communications
Counsel
ALLTEL Corporation
601 Pennsylvania Avenue, N.W.
Suite 720
Washington, DC 20004

Albert J. Catalano
Matthew J. Plache
Ronald J. Jarvis
Catalano & Plache PLLC
3221 M Street, N.W.
Washington, DC 20007
Counsel for Nextel Partners

Cheryl A. Tritt
Frank W. Krogh
Jennifer L. Kostyu
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W.
Washington, DC 20006
Counsel to ALLTEL Communications, Inc.

Public Service Commission of Wisconsin
610 North Whitney Way
P.O. Box 7854
Madison, WI 53707-7854

Stephanie L. Mott
Peter L. Gardon
Reinhart Boerner Van Deuren
P.O. Box 2018
Madison, WI 53701-2018

Nick Lester
WSTA
6602 Normandy Lane
Madison, WI 53719

Bruce C. Reuber
Interstate Telcom
Consulting, Inc.
P.O. Box 668
Hector, MN 55342-0668

Larry L. Lueck
Nsight Teleservices
Northeast Tel. Co.
P.O. Box 19079
Green Bay, WI 54307-9079

Judd A. Genda
Axley Brynerson LLP
2 E. Mifflin Street, Suite 200
Madison, WI 53703

Kira E. Loehr
Cullen Weston Pines and Bach LLP
122 W. Washington Avenue, Suite 900
Madison, WI 53703

Jordan J. Hemaiden
Michael Best and Freidrich LLP
P.O. Box 1806
Madison, WI 53701-1806

Joseph P. Wright
Stafford Rosenbaum LLP
P.O. Box 1784
Madison, WI 53701-1784

Brent G. Eilefson
Leonard Street and Deinard, PA
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402

Sharon Webber, Deputy Chief
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW, Room 5-A425
Washington, D.C. 20554


Eric Einhorn, Chief
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW, Room 5-C360
Washington, D.C. 20554

Diane Law Hsu, Acting Deputy Chief
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW, Room 6-A360
Washington, D.C. 20554

Anita Cheng, Assistant Chief
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW, Room 5-A445
Washington, D.C. 20554

Thomas Buckley
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW, Room
Washington, D.C. 20054

Gerard J. Waldron
Mary Newcomer Williams
Aaron Cooper
Covington & Burling
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401


Kimberly Verven